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Recap: *The City of Missoula v. Mountain Water Co.*

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RECAP; *The City of Missoula v. Mountain Water Co.***Nick LeTang****I. BRAD LUCK FOR APPELLANT MOUNTAIN WATER (“MW”)**

Mr. Luck began his oral argument by giving three reasons why the district court erred in its Findings of Fact, Conclusions of Law and Preliminary Order of Condemnation. His three arguments for error included (1) the district court’s refusal to allow MW’s valuation evidence; (2) the district court’s findings exhibited a philosophical preference for municipal ownership; (3) the City did not meet the high burden of proving a “more necessary” public use for the water system.

First, Mr. Luck argued that the district court erred in limiting MW’s valuation evidence during trial. Mr. Luck argued that, without such evidence, MW was not able to prove the City’s \$77 million acquisition value was too low. Had MW been able to offer valuation evidence, Mr. Luck stated that many of the City’s purported benefits of municipal ownership went out the window, such as the City’s ability to hold customer rates steady and make capital investments.

Justice McKinnon was the first to ask MW a line a questions concerning the district court’s refusal to allow MW’s valuation evidence. First, Justice McKinnon asked about the standard of review the Court should apply, i.e., whether the financial findings are reviewable for clear error or some other standard of review. Mr. Luck responded by stating that the district court’s exclusion was based upon an incorrect application of Montana’s condemnation statutes, thus reviewed *de novo*.

Next, Justice McKinnon asked MW why the Court should remand to have valuation evidence heard since the commissioner panel had ultimately determined the water system’s value at \$88.6 million during the Valuation Phase. Mr. Luck responded by stating that the City’s entire presentation of the case relied on the \$77 million acquisition value. Mr. Luck further stated that the City has had three chances to condemn the water system, and the Court should not allow another opportunity by *remanding back to the district court for dismissal*.

Justice Baker focused on the materiality of any district court error by stating that the final \$88.6 million acquisition value determined by the commissioners was within the range MW was allowed to attack during trial. Mr. Luck responded by arguing the City’s \$77 million acquisition value was wrong, unsupported, and provided no competent evidence for which the district court could make its financial findings. Mr. Luck also argued that, though MW was able to attack the City’s \$77 million by testimony on how customer rates could be affected, without its valuation evidence MW was unable to properly address numerous questions about the affordability of City ownership.

Upon concluding his remarks on the valuation evidence, Mr. Luck argued that the district court's Findings of Fact, Conclusions of Law exhibited an impermissible judicial preference for municipal ownership. Mr. Luck stated that the district court issued many broad findings based upon witnesses who gave philosophical opinions about the advantages of municipal ownership. Mr. Luck noted that both the Montana Constitution and Code do not give a preference of condemnation, further arguing that many of the district court's findings amounted to this treatment. Based upon the evidentiary error, the philosophical preference to municipal ownership, and numerous clear error findings, Mr. Luck concluded his argument by stating the record requires reversal and subsequent dismissal by the district court.

II. HARRY SCHNEIDER FOR APPELLEE CITY OF MISSOULA ("CITY")

Mr. Schneider's strategy was simple: point to the substantial evidence that the district court relied upon when making its findings. Whenever Mr. Schneider was not answering questions from the Court, he spent his time highlighting the evidence heard by Judge Townsend at trial. Shortly after beginning his argument, Justice Rice interrupted Mr. Schneider by reciting the district court's broad findings, such as the finding that private companies are unlikely to provide stable ownership and are not being well suited to the promotion of public interest goals. Justice Rice asked how the Court should handle these overly broad findings, stating that these characteristics are inherent of any business and would support condemnation in any case. Mr. Schneider responded by asking the Court to consider these broad findings in context of the entire findings and record, and, after doing so, the Court would find no philosophical preference.

Next, Justice McKinnon asked how the Court can find the City had a "more necessary" use for the water system when: (1) Mayor Engen made a statement in 2011 that City ownership of the water system was not necessary; (2) the City did not make any formal complaints about MW's handling of the water system; (3) the Public Service Commission had approved of MW's operations. Seemingly avoiding the difficult question, Mr. Schneider responded by stating that there is nothing in Montana's condemnation statutes or case law that requires a municipality put out a notice of cure.

Following Justice McKinnon, Justice Baker asked a series of questions about the redress Missoula customers would have in the event of a serious financial mistake or operational malfunction under City ownership. Mr. Schneider responded by stating that customers may voice their concerns through elected city council members. Mr. Schneider further argued that any breach in the water system would necessarily be

fixed and, under City ownership, at a price that does not include a 9.8% rate of return that MW is currently allowed to pass on to customers.

Toward the end of Mr. Schneider's time, Justices Baker and McKinnon asked questions concerning the district court's exclusion of MW's valuation evidence, including whether any clear determination could be made about what the City is likely to charge without such evidence. Mr. Schneider conceded that no clear determination could ultimately be made but stated that there are demonstrated savings under City ownership no matter the ultimate acquisition price paid. Mr. Schneider further argued that, had MW been able to give its valuation evidence, MW would have overstated the value of the water system. Lastly, Mr. Schneider argued that allowing valuation evidence into the Necessity Phase of the trial would lead to inconsistent condemnation action judgments.

III. REBUTTAL OF BRAD LUCK FOR APPELLANT MOUNTAIN WATER

Mr. Luck began his rebuttal by responding to questions from Chief Justice McGrath about the City's bonding capacity evidence. Mr. Luck argued that much of the City's bonding capacity evidence was founded on assumptions of information. After Justice McGrath's questions, Mr. Luck spent much of his time touting MW's handling of the water system, stating MW had previously received approval from the Department of Environmental Quality, the Department of Natural Resources, the Public Service Commission, and the City of Missoula itself.

IV. ANALYSIS

It appears the Court is open to potential error regarding the district court's exclusion of MW's valuation evidence. Outside of Mr. Schneider's brief statement about potential inconsistent judgments, there was little to no discussion about the concerns of allowing valuation evidence in during the Necessity Phase. None of the reasons cited by Judge Townsend for excluding such evidence were discussed during oral argument. Instead, the Court's questions seem to focus on the materiality of any error. Questions from Justices McKinnon and Baker reveal concerns about the potential mootness of any error in light of the commissioner panel's ultimate \$88.6 million value determination—a value that was within the range MW was able to attack through its hypotheticals during trial.

The Court, particularly Justice Rice, asked difficult questions concerning the evidentiary support of many of the district court's findings and whether the district court's findings exhibited a general preference for municipal ownership. However, considering the heavy burden of proving clear error on any of the multiple findings the district court used in

determining the “more necessary” standard, MW is unlikely to win a reversal on this issue.